VIRGINIA IRON, COAL & COKE CO. *v.* CLAYTOR'S ADM'R.

Nov. 14, 1918.

[98 S. E. 866.]

Error to Circuit Court, Botetourt County.

Action between the Virginia Iron, Coal & Coke Company and Claytor's administrator. There was a judgment for the latter, and the former brings error. Affirmed by divided court.

Jackson & Henson, of Roanoke, for plaintiff in error.
Haden & Haden, of Fincastle, for defendant in error.

PER CURIAM. Affirmed by divided court.
KELLY, J., absent.

E. I. DUPONT DE NEMOURS & CO. *v.* TAYLOR.

March 27, 1919.

[98 S. E. 866.]

1. Master and Servant (§ 286 (40)*)—Negligence—Evidence—Question for Jury.—Whether defendant was negligent in putting plaintiff to work on a tramroad car without notice of an overhead pipe which struck him held, under the evidence, for the jury.

2. Master and Servant (§ 289 (27)*)—Contributory Negligence—Evidence—Question for Jury.—Whether a servant was negligent in standing on a tramroad car and riding backwards when struck by an overhead pipe held, under the evidence, for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

3. Master and Servant (§ 288 (2)*)—Assumption of Risk—Question for Jury.—Whether a servant struck by an overhead pipe while riding on a tramroad car assumed the risk held, under the evidence, for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

4. Master and Servant (§ 289 (19)*)—Knowledge of Danger—Evidence.—In action for injuries to a servant struck by an overhead pipe while riding on a tramroad car, held, under the evidence, that it could not be said as a matter of law that he knew or was chargeable with knowledge of the danger.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 703.]

5. Appeal and Error (§ 930 (1)*)—Reviewing Evidence as on Demurrer.—On review of verdict for plaintiff attacked as contrary to law and evidence, the truth of all of plaintiff's parol evidence and all inferences therefrom favorable to plaintiff is admitted, regardless of conflicting evidence of defendant.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 576.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Appeal and Error (§ 930 (1)*)—Conflicting Testimony—Demurrer to Evidence.—There being a conflict in the testimony on some of the subjects bearing on the issue whether plaintiff servant knew of or was chargeable with knowledge of danger, the testimony for plaintiff must prevail under the demurrer to the evidence rule.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 576.]

7. Appeal and Error (§ 999 (3)*)—Questions Concluded by Verdict.—Subject of imputed knowledge, having been submitted under instructions prepared by defendant company's counsel without objection on the part of plaintiff, is concluded by verdict for plaintiff servant.

8. Trial (§ 296 (3)*)—Erroneous Instruction—Cure by Other Instructions.—If instruction given at request of plaintiff was subject to objection that there was no evidence justifying embodying therein the idea that plaintiff servant had no opportunity of knowledge of any danger, defendant company was not harmed, where such feature of the case was fully and completely covered by instructions given at its request.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 744.]

9. Master and Servant (§ 234 (3)*)—"Imputed Knowledge."—It is only when men of ordinary prudence and observation would have observed, under like circumstances, that a servant's opportunity for knowledge can be held the equivalent of "imputed knowledge."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Imputed Knowledge. For other cases, see 7 Va.-W. Va. Enc. Dig. 340.]

10. Master and Servant (§ 235 (1)*)—Negligence of Servant—"Negligence"—Failure to Observe.—Mere failure of a servant to observe, when there is no occasion for observation, is not "negligence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence. For other cases, see 7 Va.-W. Va. Enc. Dig. 340.]

11. Master and Servant (§ 234 (3)*) — Injuries to Servant—Knowledge of Danger.—It is only negligent ignorance that can be chargeable as the equivalent of knowledge on the part of a servant.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 340.]

12. Trial (§ 412*)—Errors in Admission of Testimony—Waiver.—Defendant's objection to plaintiff's testimony that foreman instructed plaintiff "to take my men and get on the trucks," on the ground that it was not shown that foreman had authority to give such instruction, was waived by defendant proving by its principal

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witness that "he (plaintiff) was required to ride on the car at some place."

13. New Trial (§ 74*)—Verdict—Setting Aside.—The measure of damages in personal injury suits must be left to the judgment and discretion of an impartial jury, and no mere difference of opinion on the part of the trial judge will justify any interference with verdict, unless it appears that jury has been influenced by partiality or prejudice or has been misled by some mistaken view of the merits of the case.

[Ed. Note.—For other cases, see 4 Va,-W. Va. Enc. Dig. 202; 10 Va.-W. Va. Enc. Dig. 458.]

14. Damages (§ 228*)—Reduction of Verdict—When Permissible.—If a verdict may be set aside as excessive, but is not so excessive as to evince passion, prejudice, or corruption, the plaintiff may be put upon terms to accept a reduced amount, though there is no measure of damages.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 606; 11 Va.-W. Va. Enc. Dig. 861.]

15. Damages (§ 228*)—Reduction of Verdict — Consent of Defendant.—It is not necessary that the losing party consent to remittitur.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 861.]

16. Appeal and Error (§ 162 (1)*)—Surrender of Right to Appeal —Acceptance of Verdict for Reduced Amount. — In view of Acts 1906, c. 167, the plaintiff does not surrender his right of appeal by accepting a judgment for a reduced amount provided it is done under protest.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 609.]

17. Appeal and Error (§ 1004 (3)*) — Judgment for Reduced Amount.—Judgment will be affirmed on appeal as reduced upon the presumption of its correctness, in the absence of evidence to the contrary; but when the evidence certified shows that the verdict is not so excessive as to warrant the belief that jury was influenced by partiality, prejudice, or corruption, or has been misled by some mistaken view of the merits of the case and also fails to disclose any standard by which trial court could have measured reduction, remittitur will be set aside.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 65.]

Prentis, J., dissenting in part.

Error to Circuit Court, Prince George County.

Action by A. B. Taylor against the E. I. Dupont De Nemours & Company. There was judgment for plaintiff, and defendant

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

brings error, plaintiff assigning cross-error on action of trial court requiring him to make a release of $2,000 of the verdict and accept judgment for $8,000. Affirmed, and additional judgment for plaintiff for amount which he was required to release.

Charles E. Plummer and *J. Gordon Bohannan*, both of Petersburg, for plaintiff in error.

S. M. Brandt, of Norfolk, and *R. B. Willcox, Jr.*, of Petersburg, for defendant in error.

REYNOLDS *v.* WALLACE et al.

June 12, 1919.

[99 S. E. 516.]

1. Boundaries (§ 47 (1)*)—Estoppel.—Where defendant's predecessor in title, who was present when a boundary line was run, did not then offer any objection to the result, but subsequently told his wife that he was unsatisfied and was going to the courthouse to get it settled, held that, as such predecessor became ill shortly thereafter and died without having given the matter further attention, no estoppel was raised which would preclude defendant from questioning the accuracy of the survey made.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 604.]

2. Boundaries (§ 48 (6)*)—Acquiescence—Effect—Title.—While acquiescence and admissions as to boundaries may become important evidence in determining where the boundaries are located, and may exist or be made under such circumstances as will estop the landowner from denying them, they are not in themselves independent source of title.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 603.]

3. Appeal and Error (§ 203 (3)*)—Evidence—Objections.—Objections that witnesses did not possess the qualifications necessary to render them competent cannot be raised for the first time on writ of error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

4. Appeal and Error (§ 1066*)—Review—Harmless Error.—Where the parties claimed from a common source of title, and the only controversy was the location of the boundary line, the giving of instructions in an ejectment case that to find for plaintiff the jury must find title in him, and that he must rely on hi own title, and not defects in defendant's title, held harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 564.]

5. Appeal and Error (§ 1003*)—Review—Verdict.—Where verdict was supported by evidence, though against the preponderance

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